IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1055 of 1997
With
CRIMINAL APPEAL No. 1252 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
MANUBHAI GORDHANBHAI DADHANIYA - Opponent(s)

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Appearance :

IN CRIMINAL APPEAL NO. 1055 OF 1997
MR KT DAVE, APP for Appellant(s) : 1,
MR BP MUNSHI for Opponent(s) : 1,

IN CRIMINAL APPEAL NO. 1252 OF 1997
MR BP MUNSHI for Appellant(s) : 1,
MR KT DAVE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 04/05/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1. The appeal being Criminal Appeal No. 1055 of 1997 is preferred by the State against the judgement and order dated 24.07.97 passed by the Special Judge, City Civil and Sessions Court, Ahmedabad city whereby the accused no. 2 is acquitted of all the charges levelled against him and the accused no.1-Company is found guilty of having committed an offence under the provisions of Section 3 of the Essential Commodities Act (hereinafter referred to as the 'said Act') read with Section 7 of the said Act. However, the accused no.1 being Company incorporated under the Companies Act could not be convicted or imprisoned and therefore the accused no.1 company was penalised by being fined Rs. 10,000/-.

2. The short facts of the case would read as under:

2.1 The accused no.1 company is a company registered under the provisions of the Companies Act, 1956 and

is running its business as Pharmaceutical Manufacturers at Vatva, Ahmedabad. The accused no.2-respondent herein Shri Manubhai Gordhanbhai Dadhaniya is the Managing Director of the accused no.1 Company. A Criminal Case bearing Special Criminal Case No. 1 of 1995 was filed on 03.01.95 by the complainant Shri Dilipbhai Girdharlal Shah who is a Senior Drugs Inspector designated as such under the provisions of the Drugs(Prices Control) Order, 1987 and the Drugs and Cosmetics Act, 1940. The complainant had lodged the complaint against eight persons wherein the company was arraigned as accused no.1 and the present respondent as accused no.2. The original accused nos. 3 to 8, being the Directors of the Company were also arraigned in the complaint.

2.2 It is submitted that on 19.04.94, a surprise check was carried out in the premises of the factory of the accused no.1 company whereby the statement of the accused no.2-Managing Director was recorded. In the said statement, the accused no.2 has stated that the company was holding license since 12.10.89 and the same was renewed upto 31.12.94. He has stated therein that Tab. Trikelfin which was manufactured on 14.03.90 mentioned the Maximum Retail Price(MRP) as

4.25/-. The last batch of Trikelfin was manufactured on 18.03.94 on which also the MRP was stated to be 4.25/-.

2.3 It is further stated in the statement that, as the unit was a small scale industry, by letter dated 14.12.90, necessary permission was sought from the Ministry of Industries, Department of Industrial Development, New Delhi after producing the price list of the products of the company. It is also stated in the statement that on receipt of letter dated 01.09.93, an application was moved on 23.03.94 to the Director, Government of India, Ministry of Chemicals and Fertilizers, New Delhi for the price approval of Trikelfin. Thereafter the same was also informed vide letters dated 08.04.94 and 11.04.94 addressed to the Commissioner of Foods and Drugs, Gandhinagar and letter dated 23.03.94 addressed to the competent authority at New Delhi.

2.4 The competent authority granted sanction to the complainant on 15.12.94 and thereafter the complainant filed the aforesaid complaint on 03.01.95.

2.5 The accused have represented themselves through their lawyers by filing application below Ex. 3 being discharge application whereby the accused nos. 3 to 8 were discharged by the Sessions Court vide order dated 14.03.95. The accused no.2 was represented as the Power of Attorney Holder of accused no.1 company which was placed on record and he represented the accused no.1 company as well as self. The plea was recorded and the accused no.2 appeared for both the accused.

3. The prosecution has examined the complainant Dilipbhai Girdharlal Shah-Ex. 11. The complainant has stated that he is a Senior Drugs Inspector designated as such under the provisions of the Drugs(Prices Control) Order, 1987 and the Drugs and Cosmetics Act, 1940. He was working in the office of Assistant Commissioner, Food and Drugs Control and required to implement the different notifications issued under the said Act from time to time and to make sure that the rules and provisions of Drugs and Cosmetics Act, 1940 are complied with.

3.1 He has stated that the accused no. 1 company is holding license under the provisions of Drugs and

Cosmetics Act 1940 and form no. 25 and 28 for manufacturing and marketing tablet Trikelfin since 14.03.90. It is also stated that the said drug falls under the drugs classified in category-1 to the 3rd Schedule of the said order and the said tablet has the formulation of Methymyne. Trikelphine was stated to be a part of category 1 since such tablet contained sulpha mythosaczol I.P and Methamyne I.P. It was also stated that on 14.03.99 around 25,000/- such tablets were manufactured and sold.

3.2 However, as per para 10 of the order of 1987, the permission of the Central Government is required to be taken before fixing the MRP of such tablets. It is stated that from the records it is borne out that due procedure was followed by the accused in manufacturing and selling such tablets in the market only on 14.12.90 and thereafter on 13.03.94. Such procedure as per para 10 of the order dated 1987 was not followed for the manufacture and sales as on 14.03.90 and that the complainant was therefore directed by the Office of Commissioner of Drugs to inquire into the matter and report was required to be submitted.

4. Pursuant to the said order of inquiry, it is stated that the complainant checked the premises of the factory on 19.04.94. It is stated that at that time, the accused no.2-Managing Director of the accused no.1 Company was present and he has admitted that the manufacturing was started on 14.03.90. The accused no.2 also submitted the report of manufacture and sales of the Trikelfin tablet for the period 14.03.90 to 18.03.94. A statement to that effect was submitted-Ex.12 duly signed by the accused no.2. The statement regarding the manufacturing date and the quantity manufactured was produced at Ex. 13, Form nos. 25, 26 & 28 were produced at Ex. 14, 15 & 16 respectively and thereafter after taking requisite permission on 15.12.94, the original complainant filed the present complaint which is at Ex. 17. The original complainant was extensively cross-examined.

5. The Sessions Court has considered the evidence on record and has convicted the accused no.1 Company and has given finding that accused no.2 was not involved in the day to day affairs or administration of the accused company and that the prosecution has failed to prove that accused no.2 was involved in the every day affairs of the company.

6. Mr K.T Dave, learned APP appearing for the appellant-State has contended that the Sessions Judge has not properly appreciated the fact that respondent-accused no.2 Managing Director of accused no.1-Company was responsible for the contravention as charged and was also responsible for the day to day running of the affairs of the company and that he is solely responsible for contravention of provisions of Clause 10 of the Drugs Price(Control) Order, 1987.

6.1 He has further contended that the complaint is supported by the deposition of PW-1 Shri Dilipbhai G Shah whose evidence on the record of the case at Ex. 11 is perused by the Sessions Court wherein he has deposed on oath that he had visited the premises of the manufacturing company and found failures in following the procedures prescribed under section 10 of the Drugs Price(Control) Order, 1987. He has also submitted that the Sessions Court has not properly appreciated the confession statement of accused obtained by the complainant in the office of the complainant.

6.2 Mr Dave has also contended that the Sessions

Court has erred in holding that the prosecution has failed to prove the respondent-accused guilty of the offence levelled against him beyond reasonable doubt even though the same are proved by the prosecution and involvement of the accused clearly shows that he is solely responsible for contravention of provision of section 10 of the said order.

7. The accused no.1-respondent also has filed cross appeal being Criminal Appeal No. 1252/97. Mr Munshi, learned advocate appearing for the accused no.2 -respondent has submitted that the provisions of para 10 of the said order can be attracted only in respect of a new drug or formulation and that in the instant case, admittedly, the aforesaid drug manufactured by the accused is a product extensively used in the country since prior to the year 1978 or more and as such the drug cannot be classified as a new drug. He has submitted that therefore reading para 10 in consonance with the Rule 122-E of the Rules, the company cannot be guilty of committing the offence as alleged.

7.1 He has further submitted that after manufacturing of the product on 10.12.89, the accused

had already followed procedure from 14.12.89 and as such, as provided by para 10(3) of the said order, it was obligatory on the part of the Government to accord approval within the period of four months of the receipt of an application and where within such a period of four months approval is not accorded, it was permissible to market the new formulation at a price not exceeding price as claimed by the manufacturer. He has submitted that in the instant case as the Government had not taken any action within the prescribed period of limitation, the action within the prescribed period of limitation, the complainant had no jurisdiction to lodge the complaint as provided by para 10 of the order and that hence the trial was without jurisdiction and the complaint not maintainable under law.

7.2 Mr Munshi has further submitted that the complaint was barred by limitation and the court could not have taken cognizance of the alleged offence as the complaint had been filed after lapse of the period of limitation as provided by section 468 of the Criminal Procedure Code, 1973. He has submitted that even otherwise it had been an admitted position that the accused company was marketing the

product at a price of Rs. 4.25/- per two tablets from 14.03.90 to 19.04.94 which was in accordance with the price charged by the other manufacturers of the same product. He has submitted that a comparative chart to that effect was produced before the trial court which ought to have led to the conclusion that no offence was committed by the accused company.

7.3 He has also submitted that the complainant had failed to prove that he had authority to launch prosecution. He has submitted that the complainant had only the power to search and seizure but had not been invested with the powers of initiating prosecution and filing a complaint and as such the complaint was lodged without necessary sanction resulting in vitiating of trial.

8. Heard learned counsel for the parties and perused the various documents placed on record, more particularly, Ex. 14, 15 & 16 being Forms 25, 28 & 26, Ex. 13 being the statement prepared on behalf of the accused no.1 company which was signed by the accused no.2 and also the correspondence dated 08.04.94, 11.04.94, 08.09.93 as well as Ex. 27 which clearly establishes that the accused no.2 was

involved in the day to day affairs of the accused no.1 company.

8.1 At this stage, it would be relevant to peruse section 10 of the said order which is reproduced as under:

> “General provisions regarding prices of formulations:-
>
> 1) No manufacturer or importer shall market a new formulation or a new pack, or a new dosage form of its existing formulation specified in category 1 or category 2 of the 3rd Schedule without obtaining the prior approval of its price from the Government.
> 2) No person shall sell or dispose of any imported formulation specified in category 1 or category 2 of the 3rd Schedule without obtaining prior approval of its price from the Government.
> 3) Any manufacturer or importer, who desires to obtain the approval of the Government in respect of the price for any formulation referred to in sub paragraph(1) of sub paragraph(2) shall make an application to the Government in form 2 or form 3, as the case may be and the Government, may, within a period of four months of the receipt of its application record its approval subject to such modification as it may consider necessary:
>
> Provided that where approval is not accorded within the said period of four months, the manufacturer or importer as the case may be may market the new formulation or new pack or new dosage on referred to in sub paragraph(1) at a price not exceeding the price claimed by him in his application

after intimating the Government accordingly:

> Provided further that the Government may, if it considers necessary, by order, revise the price as declared by the manufacturer or importer as the case may be, and upon such revision the manufacturer or importer shall not sell such formulation at a price exceeding the price so revised."

8.2 Further, it would also be relevant to peruse the discharge application Ex. 3 filed by the accused nos. 3 to 8 before the Court of Special Judge, Ahmedabad. The Court below while allowing the discharge application qua the accused nos. 3 to 8 has observed in para 2 as under:

> 2) ...In the complaint, it is stated that the accused no.2 is the Managing Director of the accused no.1-Company and he is in charge of the administration and business of the company..."

8.3 Further in para 5 of the said order, the Court below has very clearly observed that the learned advocate for the accused has produced power of attorney executed by the accused nos. 3 to 8 in favour of the accused no.2 authorising him to look after the administration of the company.

8.4 In para 5 the Sessions Court has very candidly

observed that during the inspection of the accused no.1-company the statement of the accused no.2 was recorded on 19.04.94, wherein also he had stated that he was Managing Director of the Company and was looking after the work including business and administration and was responsible person of the company.

8.5 Looking to the said facts, this court is of the view that the Sessions Court while acquitting the accused no.2 has committed an error in holding that the prosecution has failed to prove beyond reasonable doubt that the accused no.2 was involved in the day to day affairs and conduct of the business of the company.

8.6 The contention of Mr Munshi that the complainant is not authorised to file complaint is without any merit since the sanction was granted and as per the same he was the authorised officer to file complaint. As regards the contention qua section 122E is concerned, the same will not apply in the present case inasmuch as Section 122E came into force on 17.08.99 whereas the offence alleged in of the year 1994 and therefore the contention of limitation is

devoid of any merits.

9. As a result of hearing and perusal of records, it is borne out that the fact that the accused no.1 company is a company registered under the provisions of the Companies Act, 1956 and is running its business as Pharmaceutical Manufacturers is not disputed. It is also an admitted fact that the accused no.2-respondent herein Shri Manubhai Gordhanbhai Dadhaniya is the Managing Director of the accused no.1 Company. Further, the fact that the accused no.1 company has been manufacturing Tablet Trikelfin since 14.03.90 is also not disputed. The procedure required to be undergone by the accused no.1 company as per section 10 of the said order was initiated for the first time on 14.12.90 which is much subsequent to the manufacture and marketing of the product. The letter dated 08.04.94 addressed by the accused no.2-Managing Director of accused no.1 Company to The Commissioner of Food & Drug Control Administration, Gandhinagar is brought to the notice of this Court. From a bare reading of the said letter, it is pertinent to note that the accused no.2 has admitted the commission of the alleged offence. The relevant part of the said letter reads as under:

> “...We wish to urge you to please treat this matter softly, as this fault had done by us UNKNOWINGLY. We were totally ignorant by the procedures to be followed up. We confess SORRY, for fault done by us because unfamiliarity with the subject...
>
> ...Considering and keeping all the above circumstances in view, we wold like to request your honour, not to please take any harsh action against us, for the fault done by us in un-awareness”

10. In the above view of the matter, the finding of the Sessions Court that the prosecution has failed to prove beyond reasonable doubt that the accused no.2 was incharge of the day to day administration of the affairs of the company is misconceived inasmuch as the documents perused and the evidences discussed by this Court very well lead to the fact that the accused no.2 was directly involved in the day to day administration and conduct of the business of the company. The order passed by the Sessions Court qua the acquittal of the accused no.2 is therefore contrary to the evidence on record and is required to be modified to the said extent.

11. However, today when the matter was taken up for orders, Mr Munshi, learned advocate for the accused

no.2 has relied upon the decisions of the Apex Court and this Court in order to submit that the accused no.2 is a first time offender and in the facts and circumstances of the case he should be dealt with under the provisions of Section 360 of the Code of Criminal Procedure, 1973. In this context he has relied upon a decision of the Apex Court in the case of Harivallabha and another vs. State of M.P reported in 2005(10) SCC 330 wherein the Apex Court on the facts and circumstances of the case setting aside the sentence of imprisonment held that the accused being the first time offenders ought to have been dealt with under the provisions of section 360 of the Code.

11.1 The decisions of this Court cited by Mr Munshi are in the cases of State of Gujarat vs. Ganpatbhai Premjibhai Joshi reported in 1998(2) GLH 787 and Kayyumbhai Yusufbhai Shaikh vs. State of Gujarat reported in 2007(1) GLH 164 wherein this Court has granted benefit of probation under the provisions of Indian Penal Code as well as under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the Probation of Offenders Act.

12. This Court has gone through the decisions relied upon by Mr Munshi and has come to the conclusion that the entire offence seems to be committed unintentionally. In the offences of moral turpitude or heinous crime, the approach of the court should be of some deterrence. In the instant case, it is required to be noted that though it is an admitted position that the accused did not follow the due procedure under the aforesaid order for determining the MRP of the formulation, the rate fixed by the accused no.1 company was 4.25/- which was in accordance with the price charged by the other manufacturers of the same product. Moreover, the fact that the fault on the part of the accused no.2 is of technical nature coupled with the fact that there was no undue advantage taken by the accused drives this Court to take cognizance of the offence, which has been committed unintentionally for the first time, under the purview of section 360 of the Code of Criminal Procedure, 1973 and thereby extend the benefit of probation to the accused no.2.

13. In the above view of the matter, this Court is of the view that keeping in mind the facts and

circumstances of the case and the various provisions of law alongwith the law laid down by the Apex Court and this Court, interest of justice will be served by imposing a penalty of Rs. 10,000/- on the accused no.2.

13. For the foregoing reasons, the order of conviction of the accused no.1 is confirmed. The order of acquittal of accused no.2 is quashed and set aside. The respondent-accused no.2-Manubhai Gordhanbhai Dadhaniya is given benefit under Section 360 of the Code of Criminal Procedure in view of the fact that the accused has been involved for the first time in an offence, which is technical in nature. In that view of the matter, fine of Rs. 10,000/- shall be imposed on the accused no.2-Manubhai Gordhanbhai Dadhaniya-Managing Director of accused no.1 Company, in default to undergo Simple Imprisonment for three months. The said fine shall be paid within a period of three months from today. The order dated 24.07.1997 arising from Special Criminal Case No. 1/1995 passed by the Special Judge, Court No. 16, Ahmedabad City is modified accordingly. Criminal Appeal No. 1055 of 1997 is partly allowed.

14. In view of the order passed in Criminal Appeal No. 1055/97, Criminal Appeal No. 1252/97 is dismissed.

(ANIL. R. DAVE,J.) (K.S. JHAVERI, J.)

Divya//